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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. ERNEST J. CASIQUE, Defendant and Appellant.	B284945 (Los Angeles County Super. Ct. No. MA065906)

APPEAL from a judgment of the Superior Court of Los Angeles County, Lisa Strassner, Judge. Affirmed in part; reversed in part and remanded with directions.

Michael Allen, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Paul M. Roadarmel, Jr. and David A. Wildman, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant Ernest Casique appeals from a judgment of conviction following a jury trial. Defendant was convicted of three counts of premeditated attempted murder pursuant to Penal Code[1] sections 664 and 187, subdivision (a), and all alleged firearm and gang enhancements were found to be true.

Defendant contends the trial court erred by allowing a witness to testify without first conducting a hearing to determine whether the witness's testimony was based on personal knowledge. Defendant also contends the trial court erred by instructing the jury on a kill zone theory with CALJIC No. 8.66.1. Alternatively, he asserts remand is necessary to allow the trial court to exercise its discretion to strike firearm enhancements pursuant to section 12022.53, subdivision (h). Finally, defendant requests the trial court recalculate his presentence conduct credits which the court had improperly denied under section 2933.2. The Attorney General concedes that defendant's latter two arguments are well-taken.

We remand for the trial court to: consider whether to exercise its discretion to strike or dismiss the firearm enhancements pursuant to section 12022.53, subdivision (h); award defendant 848 days of actual custody credit; and recalculate defendant's presentence conduct credits pursuant to section 2933.1. The judgment is otherwise affirmed.

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1 Further statutory references are to the Penal Code.

II. BACKGROUND

A. *Procedural History*

Defendant's first trial on this matter concluded in a mistrial after the jury announced it was deadlocked. On May 2, 2017, the Los Angeles County District Attorney charged defendant by a second amended information with three counts of attempted willful, deliberate, and premeditated murder (§§ 664, subd. (a), 187, subd. (a)) of Susana H., Jorge E., and Alexander E.[2] on or about March 20, 2015. For Count 1, the information alleged defendant personally discharged a handgun, causing great bodily injury to Susana. (§ 12022.53, subds. (d) & (e)(1).) For Counts 1, 2, and 3, the information alleged that a principal discharged a handgun (§ 12022.53, subds. (c) & (e)(1)), and personally used a handgun (§ 12022.53, subds. (b) & (e)(1)). Finally, the information alleged defendant committed the three offenses for the benefit of, at the direction of, and in association with a criminal street gang, with the specific intent to promote, further, and assist in criminal conduct by gang members (§ 186.22, subd. (b)(5)).

On May 19, 2017, a jury convicted defendant of all three counts, and found all firearm and gang enhancements to be true. On August 25, 2017, the trial court sentenced defendant as follows: for Count 1, to a life term (§ 664, subd. (a)), with eligibility for parole after 15 years (§ 186.22, subd. (b)(5)). Defendant was also ordered to serve an additional and consecutive term of 25 years to life. (§ 12022.53, subd. (d).) The 20-year term mandated by section 12022.53, subdivision (c), and

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[2] Jorge and Alexander are brothers.

the 10-year term mandated by section 12022.53, subdivision (b), were stayed pursuant to section 654. For Count 2, defendant was sentenced to a life term (§ 664, subd. (a)), with eligibility for parole after 15 years (§ 186.22, subd. (b)(5)). Defendant was ordered to serve an additional and consecutive 20-year term (§ 12022.53, subd. (c)), and the 10-year term mandated by section 12022.53, subdivision (b) was stayed pursuant to section 654. For Count 3, defendant was sentenced to a life term (§ 664, subd. (a)), with eligibility for parole after 15 years (§ 186.22, subd. (b)(5)). Defendant was ordered to serve an additional and consecutive 20-year term (§ 12022.53, subd. (c)), and the 10-year term mandated by section 12022.53, subdivision (b) was stayed pursuant to section 654.

Defendant received 843 days of actual custody credit. The trial court found defendant was not eligible for presentence conduct credits, citing section 2933.2 and *People v. McNamee* (2002) 96 Cal.App.4th 66. The trial court also imposed fines and fees.

B. *Prosecution Case*

1. The Shooting—Susana's Testimony

A county employee read to the jury Susana's testimony from the earlier trial. That testimony included the following: On the evening of March 20, 2015, Susana, her boyfriend Jorge, and Alexander were walking south on 20th Street toward Avenue R in Palmdale, when they passed a 7-Eleven. Two cars drove up: the first was a Mustang and the second a gray Scion. Susana heard voices from the Mustang saying bad words. The driver of

the Mustang continued to drive. The Scion stopped near Susana, Jorge, and Alexander.

Two men got out of the Scion, one from the front passenger seat, and one from the rear passenger-side seat. The two men said some bad words and then started shooting at the three pedestrians. The person who had gotten out of the rear passenger-side seat shot first. He fired one shot and then got back in the car. The person who had gotten out of the front passenger seat fired about six shots. The shooters were approximately 15 feet away from Susana. When the shooting began, Jorge was standing next to Susana's left shoulder, while Alexander stood within one foot away from her right shoulder. The shooting lasted a few seconds. Susana, Jorge, and Alexander ran away. The second shooter got back in the car, and the car drove away.

The street was lit and Susana clearly saw the faces of both shooters. Susana identified the front seat passenger as Michael Casique.[3] She identified defendant as the rear seat passenger. When Susana saw defendant in the rear passenger seat, she recognized him right away as "Ernie," a man with whom Jorge had a "beef."

As Susana ran away from the shooters, she felt a burning sensation in her abdomen and in her right arm. She then fell to her knees because she was blacking out. Susana was taken to the hospital, where she underwent two surgeries and stayed three weeks.

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[3] Defendant and Michael Casique are brothers and share the same last name. We will refer to Michael Casique as "Michael."

2. Matthew Davis

Davis was a sheriff's deputy. On March 20, 2015, in the evening, Davis was at the 7-Eleven on 20th Street. Davis returned to his patrol car in the parking lot and saw two men and one woman walking on 20th Street. A few minutes after driving away in his patrol car, Davis heard five to six gunshots. Davis drove back toward the 7-Eleven and was flagged down by Jorge. Jorge said, "She's been shot." Davis saw Susana on the sidewalk. She had suffered two gunshot wounds.

3. Jorge's Testimony

At the time of his testimony, Jorge was in custody for failing to appear in court pursuant to a subpoena. His testimony about the events leading up to the shooting was similar in many respects to Susana's testimony. He saw two people get out of the car. One of them yelled "Fuck Sidas," a derogatory term for members of the Reseda 13 gang. Jorge was a member of Reseda 13. Just prior to shots being fired, Jorge had been walking shoulder to shoulder with Susana and Alexander. Jorge saw only one gun, which was held by the person who had gotten out of the front of the car. Jorge pushed Alexander out of the way of the gun and the two began to run. Alexander ran ahead of Jorge, toward the high school. Jorge fell as he was running. Jorge heard approximately five or six gunshots. One shot was fired toward Jorge. The last shots were fired toward Alexander.

Jorge volunteered that defendant was not the shooter: "Look, he didn't do it, and that's all I'm going to say." "I just want everyone to hear that. He didn't do it." Jorge stated that he

saw the person who got out of the front seat holding a revolver. He did not see the second person with a gun.

4. Robert McGaughey

a. Investigation

Sometime after the shooting, Detective McGaughey spoke with Jorge at the sheriff's station. Jorge stated that the man who exited the front passenger seat was holding a silver revolver. Jorge described the man who got out from the rear passenger seat as Hispanic, skinny, with short hair. He wore a black hat with a red bill and the letter "C" in red with white outlining. He wielded a 9-millimeter Glock.

On April 3, 2015, McGaughey interviewed Jorge. The recording of the interview was played for the jury. During that interview, Jorge stated that he saw two people with guns on the night of the shooting. Jorge identified a photograph of Michael from a photo lineup and was 95 percent sure that he was the man who got out of the front passenger seat. Jorge identified a photograph of defendant from a photo lineup as the man who got out of the rear passenger seat. When Detective McGaughey asked Jorge "[w]hich one shot," Jorge responded, "Both." When asked whether he saw a muzzle flash from both guns, Jorge stated that he saw only Michael shoot his gun.

McGaughey obtained messages from defendant's Facebook account. At 10:08 a.m. on March 20, 2015, defendant sent a message to a friend identified as "Reyes Blazed," "We don't got time for no hoes today, my boy. We going on ah mission today." McGaughey testified the term "mission" was used by gangs to

refer to going out together as a group. The overall goal of a mission was to intimidate the public and obtain respect from rivals. Reyes wrote back, "I'm go with ya foos." At 11:36 a.m., defendant messaged Reyes "[y]ou got 32 bullets," referring to .32-caliber bullets. At 11:36 a.m., defendant messaged his friend "[b]ring em."

On May 1, 2015, McGaughey executed a search warrant at a house where defendant and Michael lived. When McGaughey arrived at the house, he saw defendant standing outside. Defendant was wearing the hat described by Jorge.

b. Gang expert

The parties stipulated that the Palmas 13 Kings was a criminal street gang and on March 20, 2015, it was engaged in a gang rivalry with Reseda 13. The shooting on March 20, 2015, occurred outside of Palmas 13 Kings territory. Gang members feel disrespected if rival gang members walk through their territory.

McGaughey was a gang expert. He testified that defendant and Michael were members of the Palmas 13 Kings gang; and Jorge was a self-admitted member of the Reseda 13 gang. Jorge had gang tattoos, including "Reseda," over his left eyebrow. McGaughey had previously interviewed defendant's girlfriend. That interview was played for the jury. Defendant's girlfriend stated defendant had a "beef" with a guy named "Reseda."

McGaughey considered a hypothetical scenario based upon the facts of this case. McGaughey opined that the three attempted murders in the hypothetical were for the benefit of and in association with a criminal street gang.

It was common for witnesses or victims to not come forward to report criminal activity by a gang. It was also common for witnesses to give information to law enforcement about gang activity only to later deny making the statements.

5. Defendant's statement

On May 2, 2015, McGaughey interviewed defendant. A recording of the interview was played for the jury. During the interview, defendant stated, "I never shot a gun in my life." Defendant denied any involvement in the shooting and also denied being a Palmas 13 Kings gang member.

C. *Defense Case*

Michael testified as a defense witness. He admitted being a member of the Palmas 13 Kings. On the day of the shooting, Michael was at the 7-Eleven. He left the store in a grayish or greenish Mustang driven by his girlfriend. They drove to his house. Michael denied shooting at anyone. Upon arriving at his house, Michael heard three or four gunshots. Michael denied that defendant was at the 7-Eleven that day.

D. *Rebuttal*

McGaughey testified that he interviewed Michael on April 2, 2015, while Michael was in custody, about the night of the shooting. Michael stated he was at home on the night of the shooting, when he heard gunshots. Michael did not mention being at the 7-Eleven.

III. DISCUSSION

A. *Jorge's Testimony about Hearing Two Guns*

Prior to trial, defense counsel moved to exclude evidence that Jorge had heard from a medical doctor that two different types of bullets were found in Susana's body. Defense counsel argued it was hearsay. Both parties agreed not to elicit such testimony.

During Jorge's testimony, the prosecutor asked Jorge if he told McGaughey that he had seen "the back-seat passenger with what appeared to be a Glock 9-millimeter?" Jorge responded, "No. I told him that, um, we had heard two guns and two different kinds of guns, but I never told him that there was two shooters. I told him that we had heard two types of guns, but um, 'cus she got hit with two different types of bullets." Defense counsel objected and moved to strike. The trial court agreed and struck "'she got hit by two types of guns.'"

Two questions later, the prosecutor asked, "The person–let me go back a second. Just a moment ago you said you heard two different types of guns?" Defense counsel objected and requested a side bar conference.

At side bar, defense counsel stated, "I don't ever remember him saying to the detective that he heard two different types of guns. I think what he is alluding to when he said he heard is that he heard that there were two different types of guns because of bullets. [¶] I think before this is published or inquired by the jury he should be taken outside of the presence of the jury and asked the questions, because I think this is directly going to the statement made by the doctor."

Although the prosecutor conceded that Jorge's prior recorded statements did not indicate he heard two different types of guns, he argued that Jorge hearing two guns, which would not be hearsay, was distinct from hearing that Susana was hit by two different bullets.

Defense counsel argued he interpreted Jorge's testimony to mean Jorge had obtained the information from Susana's doctor. "So what I'm saying is *any further inquiry* into this area is going to lead, potentially, to him to say, no, I didn't hear two different guns. I heard that she was shot by two different guns, and that's why I'm saying *before we go in here*, which I don't think we should, it should be done outside the presence of the jury to determine exactly what he's saying." (Italics added). The court responded, "I'm not inclined to do that."

Defense counsel then repeatedly requested that the court conduct a hearing outside the presence of the jurors before the prosecutor be permitted to ask further questions about Jorge hearing two different types of guns. The court then asked the prosecutor, "Well, let me ask you this question. Are you planning on going any further?" The prosecutor stated "No. I mean, in light of this, I'm just going to leave it alone because I told the court I would not elicit this information, and I'm not intending to try and do that."

Court and counsel then engaged in the following exchange: "The court: Okay. Right. What's out is out, which is 'I heard two different types of guns,' and I believe [the prosecutor] is going to move on." [¶] [Defense Counsel]: Fine. [¶] The court: Anything further? [¶] [Defense counsel]: No. [¶] The court: Are you okay? [¶] [Defense counsel]: Leave it like that." Following the

side bar conference, the prosecutor asked questions about a different topic.

Defendant contends the trial court erred by admitting Jorge's testimony that he heard two different guns, without holding an evidentiary hearing outside the presence of the jurors. But counsel only requested an evidentiary hearing prior to the prosecutor asking any *further* questions about hearing two different guns. Although the court stated it was not inclined to hold such a hearing, defendant was not prejudiced by the court's indicated ruling because based on defense counsel's stated concerns, the prosecutor agreed not to ask any further questions on this topic and did not do so. Defendant did not seek any further relief. For instance, defendant did not request that the trial court strike Jorge's earlier statement, "I told him that we had heard two types of guns." Defendant has therefore forfeited his argument on appeal. (*People v. Roberts* (1992) 2 Cal.4th 271, 297.)

Moreover, even if defendant had not forfeited the argument on appeal, he would not prevail on the merits. We review the trial court's rulings on evidentiary questions for an abuse of discretion. (*People v. Thompson* (2010) 49 Cal.4th 79, 128.) A witness can testify about a matter for which he has personal knowledge. (Evid. Code, § 702, subd. (a).) "A witness' personal knowledge of a matter may be shown by any otherwise admissible evidence, including his own testimony." (*Id.*, § 702, subd. (b).) The trial court did not abuse its discretion by admitting Jorge's testimony that he heard two different kinds of guns, as the statement itself sufficiently demonstrated that Jorge had personal knowledge about the matter, that is, what he heard. Jorge's testimony, "I told him that, um, we had heard two guns

and two different kinds of guns, but I never told him that there was two shooters[,]" was expressed as a complete thought. His next statement, "I told him that we had heard two types of guns, but um, 'cus she got hit with two different types of bullets[,]" can fairly be understood as Jorge's attempt to reiterate the correctness of what Jorge "had heard."

Defendant nonetheless contends the trial court erred because Jorge never previously stated he had heard different sounds from different guns and officers did not testify about finding shell casings at the scene.[4] The existence of conflicting evidence, however, does not affect whether Jorge had personal knowledge that he heard two different types of guns. Moreover, Jorge had previously told McGaughey that there were two shooters, that he saw both Michael and defendant holding firearms, and that both men shot their weapons. Accordingly, we find the trial court acted within its discretion by admitting Jorge's testimony that he heard two different types of guns.

Defendant also argues the admission of Jorge's testimony violated his federal due process rights. Evidentiary error that rises to the level of the complete preclusion of a defense could violate a defendant's due process right. (*People v. Thornton* (2007) 41 Cal.4th 391, 452-453.) However, a trial court's application of state evidentiary law does not generally infringe on a defendant's ability to present a defense. (*People v. Bacon* (2010) 50 Cal.4th 1082, 1104, fn. 4.) Here, defendant was able to

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[4] Deputy Davis testified that he did not personally find any shell casings at the scene and did not recall if anyone else found such casings. He further testified that casings are automatically ejected from a 9-millimeter semi-automatic firearm but must be manually removed from the magazine of a revolver.

present his defense, that he was not even present at the scene of the shooting. Thus, there was no federal due process violation.

B. *Kill Zone Instruction*

Defendant contends the trial court erred by delivering CALJIC No. 8.66.1. At trial, the court, over defendant's objection, instructed the jury: "A person who primarily intends to kill one person, or persons, known as the primary target, may at the same time attempt to kill all persons in the immediate vicinity of the primary target. This area is known as the 'kill zone.' [¶] A kill zone is created when a perpetrator specifically intending to kill the primary target by lethal means also attempts to kill anyone in the immediate vicinity of the primary target. [¶] If the perpetrator has this specific intent and employs the means sufficient to kill the primary target and all others in the kill zone, the perpetrator is guilty of the crimes of attempted murder of the other persons in the kill zone. [¶] Whether a perpetrator actually intended to kill the victim either as a primary target or as someone within a kill zone is an issue to be decided by you."[5]

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[5] In *People v. McCloud* (2012) 211 Cal.App.4th 788, 802, footnote 7, the court criticized an earlier version of CALJIC No. 8.66.1: "By referring repeatedly to a 'zone of risk,' the instruction suggests to the jury that a defendant can create a kill zone merely by subjecting individuals other than the primary target to a risk of fatal injury." (*Ibid.*) The Court of Appeal explained that the instruction as written lent itself to the conclusion that individuals merely being in a zone of risk was sufficient to demonstrate intent to kill for purposes of attempted murder. (*Id.* at p. 802.)

A conviction for attempted murder requires proof that the defendant intended to kill the victim and a direct but ineffectual act toward accomplishing that goal. (*People v. Perez* (2010) 50 Cal.4th 222, 229.) Implied malice is not sufficient for attempted murder. (*People v. Stone* (2009) 46 Cal.4th 131, 139-140.) When a defendant is charged with attempting to kill multiple victims, guilt must be determined separately for each alleged victim. (*Id.* at p. 141.) The doctrine of transferred intent, which permits a conviction for murder when a defendant intends to kill a particular victim but instead kills someone else, does not apply to attempted murder. (*People v. Bland* (2002) 28 Cal.4th 313, 327-328 (*Bland*).) "To be guilty of attempted murder, the defendant must intend to kill the alleged victim, not someone else. The defendant's mental state must be examined as to each alleged attempted murder victim." (*Id.* at p. 328.)

Defendant contends that the trial court's delivery of CALJIC No. 8.66.1 permitted the jury to convict him of attempted murder without finding that he intended to kill Susana and Alexander. The contention obviously fails as to Susana because the jury found true the allegation that defendant personally and intentionally discharged a handgun causing great bodily injury to her. Defendant does not challenge the sufficiency of the evidence to support that finding and it establishes defendant's conviction for attempting to murder Susana did not rest on what defendant believes is an improper kill zone theory of liability. We therefore focus our discussion on defendant's conviction for attempting to

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Our Supreme Court has granted review in *People v. Canizales* (2014) 229 Cal.App.4th 820, review granted Nov. 19, 2014, S221958, which considered the kill zone instruction.

murder Alexander, reviewing the trial court's purported error in delivering the kill zone instruction under the reasonable probability standard of harmless error described in *People v. Watson* (1956) 46 Cal.2d 818, 836-837. (*People v. Falaniko* (2016) 1 Cal.App.5th 1234, 1245; *People v. McCloud*, supra, 211 Cal.App.4th at p. 803.)[6] We conclude that even if the kill zone instruction should not have been given, giving it was harmless.

First, the prosecutor did not refer to the kill zone theory at all during closing argument. Rather, the prosecutor stated that defendant must have "intended to kill that person," and argued that defendant was either the one who shot or was an aider or abettor to his brother. An aider or abettor shares the guilt of the actual perpetrator. (*People v. Mendoza* (1998) 18 Cal.4th 1114, 1123.) The jury was instructed on an aider or abettor theory by CALJIC No. 3.01.[7] Under either theory, however, the prosecutor

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[6] Defendant contends the instructional error should be subject to review under the harmless beyond a reasonable doubt standard of *Chapman v. California* (1967) 386 U.S. 18, 24. Defendant's assertion is premised on his argument that the kill zone instruction was relevant to the prosecution's theory of guilt. The prosecution, however, did not argue that defendant was guilty under a kill zone theory. The evidence likewise did not support such a theory. "[T]o the extent the court erred in instructing on a theory unsupported by the evidence, the error is one of state law," and subject to the *Watson* error analysis. (*People v. Falaniko*, supra, 1 Cal.App.5th at p. 1245.)

[7] The court instructed the jury: "A person aids or abets the commission or attempted commission of a crime when he or she: [¶] One, with knowledge of the unlawful purpose of the perpetrator, and [¶] two, with the intent or purpose of committing or encouraging or facilitating the commission of the

asserted the elements of attempted murder included an intent to kill the person.

Second, there was overwhelming evidence that defendant intended to kill Alexander and Jorge as a traditional aider and abettor to Michael. "To prove that a defendant is an accomplice the prosecution must show that the defendant acted 'with knowledge of the criminal purpose of the perpetrator *and* with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense.' [Citation.] 'The aider and abettor doctrine merely makes aiders and abettors liable for their accomplices' actions as well as their own.'" (*People v. Gomez* (2018) 6 Cal.5th 243, 279.) Defendant and Michael were members of the Palmas 13 Kings street gang. Prior to the shooting, defendant sent a message to a fellow gang member to bring bullets for a "mission." Defendant and Michael approached Susana, Alexander, and Jorge (a member of a rival gang, with whom defendant had "beef"), and cursed at them. Defendant, who travelled to the 7-Eleven with his brother, must have known that Michael was armed (as was defendant) before the shooting began, and both men began to fire their guns as they stood approximately 15 feet away from their victims. Defendant shot one bullet at Susana, striking her, while Michael shot multiple bullets toward Alexander and Jorge, who ran in different directions. This is evidence of a jointly planned shooting, one in which the jury had strong reason to conclude defendant intended

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crime, and [¶] three, by act or advice aids, promotes, encourages or instigates the commission of the crime. [¶] To be guilty as an aider or abettor, the defendant's intent or purpose of committing or encouraging or facilitating the commission of the crime by the perpetrator must be formed before or during the commission of the crime."

to aid and abet Michael in attempting to kill the victims who defendant did not personally shoot. Coupled with the absence of any reference to the kill zone theory in the prosecutor's argument, this demonstrates that there is no reasonable probability that defendant would have obtained a more favorable result in the absence of the kill zone instruction. (*People v. Smith* (2005) 37 Cal.4th 733, 742 ["[T]he act of purposefully firing a lethal weapon at another human being at close range, without legal excuse, generally gives rise to an inference that the shooter acted with express malice."]; *People v. Garcia* (2012) 204 Cal.App.4th 542, 554 [firing multiple shots directly at small group at close range gives rise to reasonable inference that shooter intended to kill all in the group].)[8]

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[8] Defendant also argues that CALJIC No. 8.66.1 "was legally erroneous in this case because it allowed the jury to convict [defendant] if the jury found that the attempted murders of [Susana and Alexander] were a natural and probable consequence of Michael [] intending to kill Jorge []." An aider or abettor cannot be found guilty of first degree premeditated murder under a natural and probable consequences theory. (*People v. Chiu* (2014) 59 Cal.4th 155, 158, 166.) Defendant's argument is misplaced because the trial court did not instruct the jury on natural and probable consequences, and the prosecutor did not argue that the natural and probable consequences doctrine applied.

C. *Remand for Trial Court to Exercise Discretion Whether to Strike or Dismiss Section 12022.53 Firearm Enhancements*

Defendant contends remand is necessary so that the trial court may exercise its discretion whether to strike the firearm enhancements pursuant to section 12022.53, subdivision (h).[9] Subdivision (h) of section 12022.53 became effective January 1, 2018, pursuant to Senate Bill 620. (Stats. 2017, ch. 682, § 2.) Prior to Senate Bill 620, a trial court lacked discretion to strike or dismiss a firearm enhancement pursuant to section 12022.53. (*People v. Chavez* (2018) 22 Cal.App.5th 663, 708; *People v. Arredondo* (2018) 21 Cal.App.5th 493, 506.) The Attorney General concedes that because the judgment of conviction was not yet final when Senate Bill 620 became effective, the statutory amendments apply retroactively to defendant. (*People v. Woods* (2018) 19 Cal.App.5th 1080, 1090-1091; *People v. Robbins* (2018) 19 Cal.App.5th 660, 679.) Accordingly, the case will be remanded to the trial court so that it may consider whether to strike or dismiss the firearm enhancements pursuant to section 12022.53, subdivision (h).

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9 "The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law." (§ 12022.53, subd. (h).)

D. *Remand to Correct Award of Actual Custody Credit and Recalculate Presentence Conduct Credit*

Finally, defendant contends the trial court erred at sentencing by not awarding him his full custody credit and denying him any presentence conduct credit. Defendant was arrested on May 1, 2015, and was in continuous custody until his sentencing on August 25, 2017. The trial court therefore should have awarded defendant 848 days of actual custody credits, not 843. Moreover, the Attorney General concedes, and we agree, that the trial court erroneously concluded that defendant was not eligible for any presentence conduct credit because he was convicted of murder. If defendant had been convicted of murder, he would indeed have been ineligible for presentence conduct credits. (§ 2933.2.) Defendant, however, was convicted of attempted murder. Thus, he was eligible for up to 15 percent of the actual period of confinement as presentence conduct credits (which would be 127 days). (§ 2933.1, subd. (c).) On remand, the trial court should correct the custody credits to be 848 days and recalculate defendant's presentence conduct credits.

IV. DISPOSITION

Defendant's sentence is vacated and the matter is remanded with directions for the trial court to consider whether to strike or dismiss the firearm enhancements pursuant to section 12022.53, subdivision (h). The trial court is also directed to award defendant 848 days of actual custody credits and recalculate defendant's presentence conduct credits pursuant to section 2933.1. The trial court is directed to issue a new minute order and an amended abstract of judgment, and to forward the amended abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KIM, J.

We concur:

BAKER, Acting P.J.

SEIGLE, J. *

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.